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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13

14 MICHAEL RODMAN, on behalf of
himself and all others similarly situated,

15 Plaintiff,

16 v.
17

18 SAFEWAY INC.,

19 Defendant.

Case No. 3:11-CV-03003 JST (JCS)

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
ATTORNEYS' FEES AND
EXPENSE REIMBURSEMENT,
SERVICE AWARD, AND
APPROVAL OF JUDGMENT
DISTRIBUTION PLAN**

Date: March 29, 2018

Time: 2:00 p.m.

Courtroom: 9 – 19th Floor

The Honorable Jon S. Tigar

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT, pursuant to this Court's Order Regarding Judgment Distribution (ECF #475), on March 29, 2018 at 2:00 p.m., or as soon as thereafter as counsel may be heard in Courtroom 9 of the above-entitled Court, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California, 94102, the Honorable Jon S. Tigar presiding, Plaintiff, Michael Rodman ("Plaintiff" or Rodman"), and Class Counsel will move for an award of 35% of Judgment for attorneys' fees and unreimbursed expenses, a \$10,000 Service Award for Representative Plaintiff, and approval of the proposed Plan of Judgment Distribution.

This motion is based upon this Notice of Motion and Motion and the Memorandum of Points and Authorities filed concurrently herewith, the declarations of Steven A. Schwartz, James C. Shah, Mathew Wessler, Michael Rodman, and Brian Devery filed concurrently herewith, all other pleadings, papers, records and documentary materials and file were deemed to be on file in this action, those matters of which the court may take judicial notice, and upon the oral arguments of counsel made at the hearing on this motion.

Respectfully Submitted,

Date: January 4, 2018

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	4
III.	ARGUMENT.....	7
	A. Governing Standards For Fees.....	7
	B. The Court Should Approve 35% Fee/Expense	9
	1. The Results Achieved for the Class	9
	2. The Complexity of the Case and the Risk and Expense to Counsel of Litigating it.....	10
	3. The Skill, Experience, and Performance of Counsel (both sides)	11
	4. The Contingent Nature of the Fee	13
	5. Fees Awarded in Comparable Cases	13
	6. Lodestar Cross Check.....	15
	7. Other Considerations.....	17
	C. Service Award for Class Representative Michael Rodman	18
	D. The Plan of Distribution, Including the <i>Cy Pres</i> Residual, Should be Approved	18
IV.	CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

Apple Computer, Inc. v. Superior Court

126 Cal. App. 4th 1253 (2005).....7

Ardon v. City of Los Angeles

Case No. BS363959 (Superior Court, County of Los Angeles).....15

Betancourt v. Advantage Human Resourcing, Inc.,

No. 14-cv-01788-JST, 2016 LEXIS 10361 (N.D. Cal. Jan. 28, 2016)2, 10

Chambers v. Whirlpool

214 F. Supp. 3d 877 (C.D. Cal. 2016).....11, 15

Chaudhry v. City of L.A.

751 F.3d 1096 (9th Cir. 2014).....9

City of Burlington v. Dague

505 U.S. 557 (1992)9

Dennis v. Kellogg Co.

697 F.3d 858 (9th Cir. 2012).....20, 21

Fernandez v. Victoria’s Secret Stores, LLC

2008 WL 8150856 (C.D. Cal, 2008).....3

Fischer v. SJB-P.D. Inc.

214 F.3d 1115 (9th Cir. 2000).....9

Garcia v. Resurgent Capital Servs.

2012 U.S. Dist. LEXIS 123889 (N.D. Cal. Aug. 30, 2012).....9

Gutierrez v. Wells Fargo

No. 07-05923 WHA, 2015 LEXIS 67298 (N.D Cal. 2015).....3, 6

Hunt v. Imperial Merchant Services, Inc.

560 F.3d 1137 (9th Cir. 2009).....6

In re Bluetooth Headset Prods. Liab. Litig.

654 F.3d 935 (9th Cir. 2011).....8, 9, 10

In re Cathode Ray Tube (CRT) Antitrust Litig.

No. C-07-5944 JST, 2016 LEXIS 102408 (N.D. Cal. Aug. 3, 2016) *passim*

In re: Cathode Ray Tube (CRT) Antitrust Litig.

No. C-07-5944 JST, 2016 LEXIS 5383 (N.D. Cal. Jan. 14, 2016).....2

1	<i>In re LG Front-Loading Washing Machine Litigation</i>	
2	Case No. 08-51 (D.N.J.) at Dkt. No. 421	15
3	<i>In re Omnivision Techs., Inc.</i>	
4	559 F. Supp. 2d 1036 (N.D. Cal. 2008)	9
5	<i>In re Online DVD-Rental Antitrust Litig.</i>	
6	779 F.3d 934 (9th Cir. 2015).....	10
7	<i>In re Philips/Magnavox TV Litig.</i>	
8	2012 U.S. Dist. LEXIS 67287 (D.N.J. May 14, 2012)	15
9	<i>In re Real Estate Associates Limited Partnerships Litigation</i>	
10	No. 98-7035 DDP (C.D. Cal. Nov. 24, 2003)	3
11	<i>In re Sutter Health Uninsured Pricing Cases</i>	
12	171 Cal. App. 4th 495 (2009).....	8
13	<i>In re Toyota Motor Corp. Unintended Acceleration Mktg.,</i>	
14	<i>Sales Practices, & Prods. Liab. Litig.</i>	
15	No. 8:10ML02151 JVS, 2013 LEXIS 123298 (C.D. Cal. July 24, 2013)	14
16	<i>In re Vitamins Antitrust Litig.</i>	
17	MDL No. 1285, 2001 LEXIS 25067 (D.D.C. July 16, 2001)	14
18	<i>Kerr v. Screen Extras Guild, Inc.</i>	
19	526 F.2d 67 (9th Cir.1975).....	9
20	<i>Ketchum v. Moses</i>	
21	17 P.3d 735 (Cal. 2001)	9
22	<i>Klein v. City of Laguna Beach</i>	
23	810 F.3d 693 (9th Cir. 2016).....	7
24	<i>Laffitte v. Robert Half Internat. Inc.</i>	
25	1 Cal. 5th 480 (2016)	2, 9, 14
26	<i>Laffitte v. Robert Half Internat. Inc.</i>	
27	231 Cal. App. 4th 860 (Cal. App. 2 nd 2014).....	2
28	<i>Lealao v. Beneficial California, Inc.</i>	
	82 Cal. App. 4th 19 (2000).....	8, 9
	<i>Nachshin v. AOL, LLC</i>	
	663 F.3d 1034 (9th Cir. 2011).....	20, 21

1	<i>Radcliffe v. Experian Info. Solutions Inc.</i>	
2	715 F.3d 1157 (9th Cir. 2013).....	18
3	<i>Rodriguez v. West Publ’g Corp.</i>	
4	563 F.3d 948 (9th Cir. 2009).....	13
5	<i>Ruiz v. XPO Last Mile, Inc.</i>	
6	2017 WL 6513962 (S.D. Cal. Dec. 20, 2017).....	3
7	<i>Six Mexican Workers v. Arizona Citrus Growers</i>	
8	904 F.2d 1301 (9th Cir. 1990).....	20
9	<i>Staton v. Boeing Co.</i>	
10	327 F.3d 938 (9 th Cir. 2003).....	10
11	<i>Stetson v. Grissom</i>	
12	821 F.3d 1157 (9th Cir. 2016).....	9
13	<i>Vizcaino v. Microsoft Corp.</i>	
14	290 F.3d 1043 (9th Cir. 2002).....	<i>passim</i>
15	<i>Wershba v. Apple Computer, Inc.</i>	
16	91 Cal. App. 4th 224 (Cal. Ct. App. 2001)	17
17	<i>Willner v. Manpower, Inc.</i>	
18	No. 11-cv-02946 – JST, 2015 LEXIS 80697 (N.D. Cal. June 22, 2015).....	3, 7, 8, 18
19	Rules	
20	Coordination Proceeding Special Title Rule 1550b	13

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff, Michael Rodman (“Rodman”), and Class Counsel litigated this matter for more than six years against an unyielding defendant vigorously represented by skilled counsel.¹ Every single step of this litigation was hard-fought -- from the motion to dismiss, through numerous discovery disputes, class certification, decertification, two rounds of cross motions for summary judgment, and then through the eve of trial, a new round of discovery, the eve of a second scheduled trial, and appeal. At the end of the day, Class Counsel met the challenge and obtained a judgment of more than \$42 million, representing 100% of damages plus pre- and post-judgment interest. Moreover, Safeway will soon pay over \$100,000 in taxable costs and has also agreed to pay the administration costs (estimated at over \$350,000) to provide notice and distribute the Judgment.²

By this Motion, Plaintiff and Class Counsel request that the Court:

- Award 35% of the Judgment for attorneys’ fees and unreimbursed (*i.e.*, non-taxable) expenses;³ and
- Approve a \$10,000 Service Award for Rodman for his efforts in achieving the Judgment; and
- Approve the Plan of Judgment Distribution, including the proposed *cy pres* payment of any residual funds to Meals on Wheels.

¹ Safeway’s counsel through the majority of this case, Craig Cardon, was recently recognized by Law360 as a “2017 MVP” for his work on retail and ecommerce matters. <https://www.law360.com/articles/989749/mvp-sheppard-mullin-s-craig-cardon>

² The parties agreed to defer discussion of the responsibility for administration costs of any secondary distribution.

³ Class Counsel have incurred approximately \$267,212.28 in unreimbursed expenses, net of taxable costs to be paid by Safeway. Class counsel do not seek a separate award for these expenses. Rather, they are included in the requested 35% award.

1 If approved, the 35% Fee and Expense award will result in Class Counsel
 2 receiving a 2.1 multiple on their lodestar for their dogged work. At the same time,
 3 class members will receive in the first distribution an average net recovery of 89% of
 4 the markup they paid. Moreover, given the likelihood of a secondary distribution
 5 due to uncashed checks, it is likely that class members who cash their checks will
 6 ultimately receive the full amount of their markup plus most, if not all, of the
 7 associated interest.

8 Given the exceptional result here -- a full recovery of damages plus pre- and
 9 post-judgment interest, taxable costs, and administration costs -- as well as the effort
 10 required to achieve it, the requested fee/expense award is appropriate under the
 11 governing standards using either a percentage-of-the-fund or lodestar-plus-multiplier
 12 methodology. For example, the Supreme Court of California recently affirmed a fee
 13 award representing 33.33% of a \$19 million common fund, plus expenses, where the
 14 amount recovered was only 16% of the total amount in controversy in the case.
 15 *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, (2016) and 231 Cal. App. 4th
 16 860, 869 (Cal. App. 2nd 2014).

17 As this Court and the Ninth Circuit have held, the “most important factor is the
 18 results achieved for the class” and “[o]utstanding results merit a higher fee.” *See In*
 19 *re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 U.S. Dist.
 20 Lexis 102408 at *62-64, 68-69, 71 (N.D. Cal. Aug. 3, 2016) (citing cases and
 21 awarding 27.5% fee, representing 1.94 lodestar multiple, based on 20 percent
 22 recovery of damages, and discussing cases with awards of up to 30%); *In re:*
 23 *Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 U.S. Dist.
 24 LEXIS 5383 at *171 (N.D. Cal. Jan. 14, 2016) (awarding 30% fee, plus expenses);
 25 *Betancourt v. Advantage Human Resourcing, Inc.*, No. 14-cv-01788-JST, 2016 U.S.
 26 Dist. LEXIS 10361 at *13-14, 24 (N.D. Cal. Jan. 28, 2016) (awarding 34.3% of
 27 recovery that represented only 9.7% of maximum potential recovery and noting that
 28

1 “the majority of class action settlements approved” have “fee multipliers that” fall
 2 “between 1.5 and 3,” *citing Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th
 3 Cir. 2002) (affirming 3.63 multiple); *Willner v. Manpower, Inc.*, No. 11-cv-02946 –
 4 JST, 2015 U.S. Dist. LEXIS 80697 at *11, 17-18, 22 (N.D. Cal. June 22, 2015)
 5 (awarding 30% or recovery that was only “between 30 and 35%” of potential
 6 recovery had the plaintiff “prevailed at trial,” and finding that “Multipliers can range
 7 from 2 to 4 or even higher.”); *see also Ruiz v. XPO Last Mile, Inc.*, 2017 WL
 8 6513962 at *5-7 (S.D. Cal. Dec. 20, 2017) (awarding 35% of \$13.9 million
 9 settlement fund (representing a 1.78 multiplier), plus almost \$250,00 in expenses,
 10 even though plaintiffs “may of course have won more at trial.”); *Fernandez v.*
 11 *Victoria’s Secret Stores, LLC*, 2008 WL 8150856 at *14-16 (C.D. Cal, 2008)
 12 (awarding 34% of gift cards valued at \$8.5 million (representing a 1.8 multiplier),
 13 plus almost \$250,000 in expenses, after only 2 years of litigation and before expert
 14 discovery or summary judgment proceedings).

15 Further, the 35% award will represent only a 2.1 multiplier of Class Counsel’s
 16 lodestar, which is also easily within the range commonly awarded. In another recent
 17 case where, as here, counsel achieved a fully-litigated judgment representing a full
 18 recovery (\$203 million judgment), Judge Alsup awarded fees representing a
 19 multiplier of more than 5 times class counsel’s lodestar. *Gutierrez v. Wells Fargo*,
 20 No. 07-05923-WHA, 2015 US Dist. LEXIS 67298 at *23 (N. D Cal. 2015). *See*
 21 *also* Final Order and Judgment in *In re Real Estate Associates Limited Partnerships*
 22 *Litigation*, No. 98-7035 DDP (C.D. Cal. Nov. 24, 2003) (Schwartz Decl., Exhibit
 23 14) at ¶24) (Judge Dean Pregerson awarded class counsel 35% of an \$83 million
 24 settlement,⁴ plus over \$5.7 million in expenses,⁵ representing a 1.57 multiplier. *See*
 25 Schwartz Decl., ¶ 22.

26 ⁴ In that case, lead trial counsel Chimicles & Tikellis LLP obtained an approximate
 27 \$120 million judgment of damages plus pre-judgment interest before the trial court,
 28 and settled the case for \$83 million prior to substantive appellate proceedings.
 Schwartz Decl., ¶22.

1 Finally, the proposed \$10,000 service award for Plaintiff is consistent with
 2 governing standards, as is the parties' Plan of Judgment Distribution, including the
 3 proposed *cy pres* payment of any residual funds to Meals on Wheels.

4 II. BACKGROUND

5 As reflected by the nearly 500 docket entries, securing this recovery required
 6 almost seven years of hard-fought litigation. As reflected at paragraph 12 of the
 7 Schwartz Declaration, the efforts of Class Counsel and Plaintiff included, but by no
 8 means were limited to, the following:

9 **Pleadings:** Drafting the Complaint and Amended Complaint and defeating
 10 Safeway's Motion to Dismiss.

11 **Document Discovery:** Serving nine sets of document requests, nine sets of
 12 interrogatories, two sets of requests to admit; reviewing tens of thousands of pages
 13 of documents; analyzing numerous, large transaction databases; responding to three
 14 sets of interrogatories, and document requests; and conducting substantial
 15 investigative work.

16 **Discovery Motions:** Participating in dozens of meet and confer sessions
 17 concerning discovery disputes; briefing multiple discovery disputes before
 18 Magistrate Judge Spero (ECF # 37, 62, 67, 76, 80, 82); attending three hearings
 19 before Judge Spero (ECF # 64, 77, 93), and handling emergency pre-trial motions
 20 and conferences with the Court related to Safeway's late production of documents
 21 from its Legacy Shared Computer Drive Archive (ECF # 378, 379, 380).

22 **Depositions:** Conducting 12 depositions of Safeway personnel, former
 23 Safeway officers, employees and contractors, and the designee for the Internet
 24 Archive; deposing Safeway's damages expert Joseph Anastasi and its Survey expert
 25

27 ⁵ Thus, class counsel received almost 42 % of the settlement fund for fees and
 28 expenses. Schwartz Decl., ¶22.

1 David Lewin, and defending the deposition of Plaintiff's damages and database
2 expert Paul Manning, as well as Plaintiff's deposition.

3 **Expert Discovery:** Working with Plaintiff's consulting and testifying database
4 experts in evaluating Safeway's database productions (which had to be repeatedly be
5 reproduced due to missing data fields and compilation mistakes identified by Class
6 Counsel and their experts) and in connection with testifying-expert Paul Manning's
7 report and supplemental report regarding damages; consulting with non-testifying
8 survey experts and working with those experts to address the expert reports
9 proffered by Safeway.

10 **Contested Motion Practice:** Briefing and arguing myriad motions, including
11 motions for class certification, decertification, permission for interlocutory appeal,
12 two rounds of cross motions for summary judgment with supplemental briefing and
13 sur-replies regarding liability, contract modification, damages, affirmative defenses,
14 and the limitation of liability clause in Safeway's online grocery contract,
15 reconsideration, motions to strike, evidentiary objections, and *Daubert* motions.

16 **Trial Preparation:** Fully preparing for two distinct trials related to pre-2006
17 damages issues, including filing the required Joint Pretrial Statement, briefing
18 numerous motions *in limine*, participating in the final pretrial conference,
19 interviewing and preparing witnesses, assembling and exchanging all trial exhibits
20 and compiling impeachment exhibits and related work with vendors to load exhibits
21 with appropriate highlights and call-outs for trial-presentation purposes, and
22 preparing outlines for opening and closing arguments, direct examination and cross
23 examination of witnesses, and preparing for anticipated legal issues in connection
24 with trial.

25 **Settlement Negotiations:** Briefing and participating in a court-ordered Early
26 Neutral Evaluation before Stephen Taylor; briefing and preparing for a mediation
27 before retired Judge William Cahill of JAMS including various pre-mediation phone
28

calls/meeting with Judge Cahill; fully briefing and participating in a mediation before retired Judge Edward Infante of JAMS; and participating in the Ninth Circuit's mediation process.

Appellate Proceedings: Fully briefing and arguing Safeway's appeal to the Ninth Circuit and related preparation, including various moot courts and consultations with appellate specialists Gupta Wessler PLLC, whom Class Counsel retained to assist in defeating Safeway's appeal. *See* Wessler Declaration

Judgment Distribution Related Work: Consulting with various administrators, conducting legal and other independent research and evaluating and crafting plans for an effective notice program, judgment distribution program, and to minimize uncashed checks; successfully negotiating with Safeway to pay class counsel's taxable costs of \$118,610.80, plus the costs of Judgment Administrator, Angeion Group, (estimated at over \$350,000) for notice and judgment distribution services.⁶

Update regarding Notice: Consistent with this Court's Order Regarding Judgment distribution (ECF#475), Judgment Administrator, Angeion Group, has updated the class member address lists and distributed Notice to class members. *See* Devery Declaration. Notice was disseminated on December 15, 2017. The deadline for any objections from class members is March 2, 2018. To date, no class member has filed any objection or reached out to Class Counsel or the Judgment Administrator to raise any objections. Schwartz Decl., ¶15; Devery Decl., ¶17. Class Counsel and the Judgment Administrator have collected updated contact information to further update the Class List and also responded to all substantive

⁶ While Class Counsel believe Safeway is responsible for such costs, *see Hunt v. Imperial Merchant Services, Inc.*, 560 F.3d 1137, 1144 (9th Cir. 2009), the authority is not singular on the issue. Indeed, Judge Alsup recently refused to order Wells Fargo to pay such costs. *See Gutierrez*, 2015 US Dist. LEXIS 67298 at *29. Securing Safeway's agreement, therefore, ensured that class members' net recovery would not be diluted by administrative expenses.

1 inquiries from class members. Schwartz Decl., ¶15; Devery Decl., ¶3, 8-15, 17.
 2 Class Counsel will address class members' reaction to the Fee/Expense request,
 3 service award, and plan of distribution in their reply due on March 16, 2018. As
 4 reflected at paragraph 11 of the Rodman declaration, he supports Class Counsel's
 5 fee request.

6 **III. ARGUMENT**

7 **A. Governing Standards For Fees**

8 **Rule 23(h):** Even though Class Counsel seek fees from a judgment fund, and
 9 not a settlement fund, their fee request is still subject to Court review and approval
 10 pursuant to Fed. R. Civ. P. 23(h).

11 **California Law:** All of Class members' claims were based on California
 12 contract law pursuant to a California choice-of-law provision in Safeway's online
 13 grocery delivery contract. Moreover, this Court's jurisdiction was based on
 14 diversity. Accordingly, as this Court held in *Willner*, 2015 U.S. Dist. LEXIS 80697
 15 at *15-16:

16
 17 The law governing the settled claims, here California law, also governs
 18 the award of fees. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
 19 1047 (9th Cir. 2002) ("Because Washington law governed the claim, it
 20 also governs the award of fees."). Nevertheless, the Court may still
 21 look to federal authority for guidance in awarding attorneys' fees.
 22 *See Apple Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253,
 1264 n. 4, 24 Cal. Rptr. 3d 818 (2005) ("California courts may look to
 federal authority for guidance on matters involving class action
 procedures.").

23
 24 *Accord Klein v. City of Laguna Beach*, 810 F.3d 693, 701 (9th Cir. 2016) ("federal
 25 courts apply state law for attorneys' fees to state claims because of the *Erie*
 26 doctrine").

27 **Percentage Method with Lodestar Crosscheck:** In determining the
 28 appropriate fee in connection with a common fund settlement, "courts have

1 discretion to employ either the lodestar method or the percentage-of-recovery
 2 method.” *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. Lexis
 3 102408 at *61, quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,
 4 942 (9th Cir. 2011); accord *Willner*, 2015 U.S. Dist. LEXIS 80697 at *15-16;
 5 *Betancourt*, 2016 U.S. Dist. LEXIS 10361 at *20, citing *In re Bluetooth* and *Lealao*
 6 *v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 27, 97 Cal. Rptr. 2d 797
 7 (2000) (“Despite its primacy, the lodestar method is not necessarily utilized in
 8 common fund cases.”).⁷ Courts typically exercise their discretion to use the
 9 percentage method, where, as here, there is an easily-quantified common fund, in
 10 lieu of engaging in the more time-consuming task of calculating the lodestar. *Id.* In
 11 such cases, courts typically perform a “lodestar cross-check to ensure the
 12 reasonableness of its selected percent-of-the-fund award.” *In re Cathode Ray Tube*
 13 *(CRT)*, 2016 U.S. Dist. Lexis 102408 at *71; *Willner*, 2015 U.S. Dist. LEXIS 80697
 14 at *17, citing *In re Bluetooth* and *In re Sutter Health Uninsured Pricing Cases*, 171
 15 Cal. App. 4th 495, 512, 89 Cal. Rptr. 3d 615 (2009).

16 In the Ninth Circuit, the “benchmark” percentage for an award of attorneys’ fees
 17 in a class action is 25 percent. *In re Cathode Ray Tube (CRT)*, 2016 U.S. Dist. Lexis
 18 102408 at *61-62, citing *In re Bluetooth*, 654 F.3d at 942. This benchmark is just a
 19 starting place, however, and the Court must determine the appropriate percentage by
 20 “tak[ing] into account all of the circumstances of the case.” *Id.* at 62, citing
 21 *Vizcaino*, 290 F.3d at 1048.

22 ***Ketchum/Kerr Factors:***

23 Under both California and Ninth Circuit law, courts consider various factors to
 24 determine whether an upward adjustment to the 25% benchmark or a multiplier on
 25 counsel’s lodestar is warranted. Under California law, courts typically consider the
 26

27 ⁷ Like this case, *Betancourt* involved California state-law claims litigated in this
 28 Court pursuant to diversity jurisdiction. *Id.* at *2-3, 7.

1 following adjustment factors in deciding an appropriate fee award: (1) the results
 2 achieved for the class; (2) the complexity of the case and the risk of and expense to
 3 counsel of litigating it; (3) the skill, experience, and performance of counsel (both
 4 sides); (4) the contingent nature of the fee; and (5) fees awarded in comparable
 5 cases. *See Ketchum v. Moses*, 17 P.3d 735, 741, 744-45 & n.2 (Cal. 2001); *accord*
 6 *Chaudhry v. City of L.A.*, 751 F.3d 1096, 1106 (9th Cir. 2014) (contingency risk is a
 7 relevant factor under California state law); *Garcia v. Resurgent Capital Servs.*, 2012
 8 U.S. Dist. LEXIS 123889, at *33 (N.D. Cal. Aug. 30, 2012) (same); *see also Laffitte*
 9 *v. Robert Half Internat., Inc.*, 1 Cal. 5th 480, 489, (2016) (citing *Lealao*).

10 Court applying federal law consider similar factors. *CRT*, 2016 U.S. Dist. Lexis
 11 102408 at *61-62 at 62, citing *Vizcaino*, 290 F.3d at 1048-1049 and *In re Bluetooth*,
 12 654 F.3d at 941-42.⁸ These factors are referred to as the “Kerr factors.” *Id.* at *62,
 13 citing *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000) and *Kerr v.*
 14 *Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975), abrogated on other
 15 grounds by *City of Burlington v. Dague*, 505 U.S. 557(1992); *see also Stetson v.*
 16 *Grissom*, 821 F.3d 1157, 1166-67 (9th Cir. 2016). Generally, however, under
 17 California law, “trial courts have considerably wider latitude ... in the selection of
 18 factors that may be used” *Lealao*, 97 Cal. Rptr. 2d at 815 (citation omitted).

19 **B. The Court Should Approve 35% Fee/Expense Request**

20 All of the *Ketchum/Kerr* factors support the requested fee.

21 **1. The Results Achieved for the Class**

22 “The most important factor is the results achieved for the class. Outstanding
 23 results merit a higher fee.” *In re Cathode Ray Tube (CRT)*, 2016 U.S. Dist. Lexis
 24 102408 at *62-63, citing *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046
 25 (N.D. Cal. 2008) and *In re Bluetooth*, 654 F.3d at 942. Class Counsel here obtained
 26 a 100% recovery of breach of contract damages, pre- and post-judgment interest,
 27
 28

1 taxable costs, plus the costs of notice and judgment administration expenses.⁸ Very
 2 few class action settlements in the Ninth Circuit or elsewhere have resulted in full
 3 recoveries of damages plus interest, and even fewer litigated judgments in class
 4 actions have resulted in the full recovery achieved here. In the *CRT* cases, this Court
 5 awarded 30% and 27% of the common fund even though the recoveries, while
 6 impressive, fell far short of the complete recovery here. In the *Gutierrez* and *Real*
 7 *Estate Associates* cases, cited above, class counsel's results amply justified the 35%
 8 percentage award and a 5-times multiplier award (about 2.5 times the requested
 9 multiplier here). In *Betancourt*, this Court awarded 34.3% of the common fund
 10 recovery because "the average individual recovery for attending an interview
 11 exceeds the average hourly rate" that class members should have been paid (even
 12 though that recovery represented only 9.7% of maximum potential recovery when
 13 including potential statutory damages). 2016 U.S. Dist. LEXIS 10361 at *2-3, 13-
 14 14, 24.

15 Given the outstanding recovery here, and the effort that was required to
 16 achieve it, a 35% fee is well-deserved. This is particularly true since, even after
 17 payment of 35% in fees and expenses, the class will still receive a net recovery of
 18 89% of the markup, and those class members who cash their checks could easily
 19 receive their full share of markup plus interest after a second round distribution due
 20 to uncashed checks.

21 **2. The complexity of the case and the risk of** 22 **and expense to counsel of litigating it**

23 As set forth above and as reflected by nearly 500 docket entries, this case
 24 involved complex legal and factual issues, including the issue of first impression that

25 _____
 26 ⁸ It is appropriate to include the costs of notice in the valuation of the common fund
 27 for percentage-fee purposes. See *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d
 28 934, 953 (9th Cir. 2015); *Staton v. Boeing Co.*, 327 F.3d 938, 974-975 (9th Cir.
 2003). Class Counsel's 35% request does not, however, seek fees based on the
 approximately \$350,000 of such costs being paid by Safeway.

1 went up to the Ninth Circuit, concerning whether online terms conditions can bind
 2 consumers to future amendments without actual notice of amendments. Additional
 3 complex issues included: class certification issues; the facts surrounding Safeway's
 4 online grocery delivery business and its historical contracts; changes to those
 5 contracts; FAQs, advertising, and course of conduct over a decade; legal contract
 6 liability issues including contract formation issues, expert survey evidence, and
 7 difficult damages issues; Safeway's affirmative defenses; and appellate issues. The
 8 Court once described this case as "one of the most interesting cases I have." ECF
 9 #400, at 7.

10 In prosecuting the case, Class Counsel incurred a substantial lodestar – almost
 11 \$7 million – and almost \$400,000 in expenses, all contingent on success. Given
 12 Safeway's hard-nosed litigation strategy and unwillingness to settle the case at any
 13 stage of the litigation, Class Counsel faced substantial risks in prosecuting class
 14 members' claims.

15 **3. The skill, experience, and performance of counsel (both sides)**

16 This factor strongly supports an upward adjustment, not just due to the skillful
 17 and efficient performance of Class Counsel, but also due to the caliber of Safeway's
 18 attorneys and the vigorous defense put forth by Safeway. As the Court is aware,
 19 nearly every issue in the case was contested, resulting in protracted litigation with
 20 risk at every step.

21 Safeway is a billion dollar company with formidable in-house attorneys that
 22 made a decision to vigorously contest the litigation. Schwartz Decl., ¶12. Judge
 23 White repeatedly recommended that the parties explore early settlement (*See* ECF#
 24 55, at 8:18-24; ECF# 69). Safeway, however, refused to participate in an early
 25 mediation before retired Judge Cahill of JAMS, and a subsequent mediation with
 26 Judge Infante was unproductive.. Schwartz Decl., ¶12.

1 Safeway's lead outside counsel Craig Cardon is an Executive Committee
 2 member of Global 100 law firm Sheppard Mullin and widely recognized as a
 3 formidable adversary. Mr. Cardon was assisted by his partner Anna McLean among
 4 others at Sheppard Mullin and, during the course of the litigation, by highly-
 5 distinguished Reed Smith Appellate specialists Paul Fogel and Brian Sutherland.
 6 Safeway also employed two renowned experts from Berkley Research Group. *Id.* at
 7 ¶13. After Sheppard Mullin's withdrawal from the case, a four-partner team of
 8 litigators from Reed Smith joined Messrs. Fogel and Sutherland in defending
 9 Safeway. *Id.* In short, Safeway hired the best, most aggressive lawyers with
 10 instructions to concede nothing and litigate everything.⁹

11 In the face of this formidable team of adversaries, Class Counsel skillfully and
 12 doggedly prosecuted class members' claims to judgment and defeated Safeway's
 13 appeal. Class Counsel Messrs. Schwartz and Mathews of Chimicles & Tikellis LLP
 14 have a track record of success in prosecuting complex, cutting edge national class
 15 actions, including other full recovery outcomes in this court, such as a \$53 million
 16 settlement with Apple in which class members received on average a net recovery of
 17 about 117%. *Id.* at ¶¶6-8.¹⁰ Judge Olguin of the Central District of California
 18 recently described Messrs. Schwartz of Matthews as "among the most capable and
 19 experienced lawyers in the country in [consumer class actions]." *Chambers v.*
 20 *Whirlpool*, 214 F. Supp. 3d 877, 902 (C.D. Cal. 2016). Likewise, Mr. Shah and his
 21 firm, Shepherd, Finkelman Miller and Shah LLP, have a long history of obtaining
 22 excellent results on behalf of classes they represent. *See* Shah Declaration at ¶¶9-10.
 23 The qualifications of Class Counsel are set forth in more detail in the Schwartz and
 24

25 ⁹ The "concede nothing" attitude changed somewhat shortly before the second-
 26 scheduled trial, after the Reed Smith litigators took over the representation. *Id.* But
 Reed Smith vigorously prosecuted Safeway's appeal.

27 ¹⁰ They have also achieved other full or near-full class recoveries in cases against
 28 Siemens, T-Mobile, Whirlpool, Bayer Corp., American Airlines, Merrill Lynch, 24
 Hour Fitness, and Nationwide Insurance. *Id.*

1 Shah declarations. The Wessler declaration sets forth the experience of Gupta
 2 Wessler PLLC, one of the most highly-regarded appellate firms that Class Counsel
 3 hired to assist in defense of Safeway's appeal.

4 Absent Class Counsel's skill and tireless efforts, class members' recovery
 5 would have, at best, been far less than the full recovery achieved here.

6 **4. The contingent nature of the fee**

7 Class Counsel's fee was entirely contingent. They litigated the case for more
 8 than six years, foregoing work on other matters, with the risk that all could have
 9 been for naught. Moreover, Class Counsel were not assisted by any governmental
 10 investigation or newspaper expose.¹¹ They prosecuted the case themselves (with
 11 the assistance of Rodman) and faced an intransigent adversary. Moreover, the fact
 12 that there were no copycat cases filed by other class action firms – in a practice area
 13 where copycats are frequent – suggests that this was perceived as a difficult case.
 14 Accordingly, “this factor weighs strongly in favor of an increase from the Ninth
 15 Circuit 25% benchmark for attorney's fees.” *In re (CRT)*, 2016 U.S. Dist. Lexis
 16 102408 at *67-68.

17 **5. Fees awarded in comparable cases**

18 Because this case was fully-litigated to judgment for the entire amount of
 19 potential damages, plus interest, which was successfully defended on appeal, there
 20 are very few truly “comparable” class action cases. In the *CRT* cases, where far less
 21 than 100% of damages were recovered, this Court awarded 30% and 27.5% to class

22 _____
 23 ¹¹ See *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (awarding
 24 multiplier in part based upon finding “that counsel faced substantial risk in
 25 prosecuting this action [in that it] did not have the benefit of fruits from underlying
 26 government actions”), remanded on other grounds, 2010 U.S. Dist. LEXIS 24155
 27 (C.D. Cal. Feb. 3, 2010); cf. *Coordination Proceeding Special Title Rule 1550b*,
 28 2004 Cal. Super. LEXIS 257, *25 (2004) (multiplier should be reduced because
 “[c]lass counsel fail to reconcile their risk assessment with the benefits they
 obtained . . . other earlier government and private . . . proceedings . . .” and
 observing that “[t]he ability to rely upon a prior government enforcement action is
 widely understood by courts and commentators to materially reduce contingent
 risk.”).

1 counsel representing the direct and indirect purchaser classes, respectively, and
 2 discussed other cases involving awards between 25% and 30%. Other decisions
 3 reflect awards of similar and even higher percentages for lesser results than achieved
 4 here. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices,*
 5 *& Prods. Liab. Litig.*, No. 8:10ML 02151 JVS (FMOx), 2013 U.S. Dist. LEXIS
 6 123298 at *307-309 (C.D. Cal. July 24, 2013) (awarding 2.87 lodestar multiplier and
 7 citing “empirical study” that “in 2006 and 2007” the most frequently awarded
 8 percentages for attorneys’ fees in the Ninth Circuit were “25 percent, 30 percent and
 9 33 percent” and that across all federal courts, “[n]early two-thirds of the awards
 10 were between 25 percent and 35 percent.”), citing, among other cases, *In re Vitamins*
 11 *Antitrust Litig.*, MDL No. 1285, 2001 U.S. Dist. LEXIS 25067, (D.D.C. July 16,
 12 2001) (awarding 34 percent of \$365 million settlement fund).

13 None of those cases involved anything remotely approaching a full recovery.
 14 This Court’s decision to award 34.3% in *Betancourt* is much closer on point as is
 15 Judge Pregerson’s 35% award in *Real Estate Associates*. Likewise, in *Laffitte*, the
 16 Supreme Court of California affirmed a fee award representing 33.33% of a \$19
 17 million common fund, plus expenses, where the amount recovered was only 16% of
 18 the total amount controversy in the case. *See* 1 Cal. 5th 480, and 231 Cal. App. 4th
 19 860, 869. The decisions in *Ruiz* and *Fernandez* awarding 35% and 34% percent plus
 20 expenses also support the percentage requested here.

21 Moreover, this is not a case “where awarding 25% [or more] of a ‘megafund’
 22 would yield windfall profits for class counsel in light of the hours spent on the case.
 23 *See In re CRT*, 2016 U.S. Dist. Lexis 102408 at *69-70. Unlike the *CRT* cases and
 24 others discussed in this Court’s fee decisions where the potential damages were
 25 enormous, thereby resulting in large common fund recoveries despite recovering
 26 only a fraction of potential damages, here the maximum potential damages were in
 27 the low tens of millions, and the Judgment Fund is slightly more than \$42 million
 28

1 due to Class Counsel's diligence and efforts in recovering the totality of the
 2 damages, plus interest and taxable costs. In megafund cases, this Court has relied
 3 upon a lodestar cross-check to evaluate the propriety of a fee award. *Id.* As
 4 reflected below, a crosscheck of Class Counsel's lodestar reveals that the 35%
 5 request results in a lodestar multiplier of about 2.1, which is well within range of
 6 fees awarded in less successful cases.

7 **6. Lodestar cross check**

8 Class Counsel's lodestar through December 2017 is \$6,882,750.93 as follows:

9 Firm	Hours	Lodestar
10 Chimicles & Tikellis LLP	7,698.14	\$4,754,492.33
11 Shepherd Finkelman 12 Miller & Shah LLP	3,175.40	\$1,923,363.00
13 Gupta Wessler PLLC	323.22	\$204,895.60
14 TOTALS	11,196.76	\$6,882,750.93

15 See Schwartz, Shah and Wessler Declarations at ¶ 18 & Exhibit 2, ¶ 5 & Exhibit 1,
 16 and ¶ 9 respectively.¹² That lodestar will increase as Class Counsel continue to
 17 perform their duties managing the distribution of the Judgement. Thus, if the Court
 18 grants the requested 35% fee/expense request, the multiple on Class Counsel's

19 _____
 20 ¹² Class Counsel maintain contemporaneous detailed time records (*id.* at ¶¶ 17, 4,
 21 and 3 respectively) and their rates are consistent with those upheld by this Court in
 22 *In re CRT*, 2016 U.S. Dist. LEXIS 24951 at *303-305. Moreover, undersigned
 23 Class Counsel's rates have been repeatedly been approved by Courts, including in
 24 connection with adversarial fee petitions. *Chambers v. Whirlpool*, 214 F. Supp. at
 25 899 (approving rates of Messrs. Schwartz and Mathews in contested fee
 26 proceeding); *In re LG Front-Loading Washing Machine Litigation*, Case No. 08-51
 27 (D.N.J.) at Dkt. No. 421 at page 1 (copy at Schwartz Decl., Exhibit 5 ("the hourly
 28 rates of each Lead Counsel firm are likewise reasonable and appropriate in a case of
 this complexity"); *In re Philips/Magnavox TV Litig.*, 2012 U.S. Dist. LEXIS 67287,
 44-48 (D.N.J. May 14, 2012) (copy at Schwartz Decl., Exhibit 12) ("The Court
 finds the billing rates to be appropriate and the billable time to have been reasonably
 expended."); *Ardon v. City of Los Angeles*, Case No. BS363959 (Superior Court,
 County of Los Angeles), Final approval Order at 19-20 (copy at Schwartz Decl.,
 Exhibit 10-11 (approving C&T's rates, including Co-Lead Counsel Mr. Mathews'
 rate). See generally Schwartz Decl., ¶ 19 & related exhibits; see also Shah Decl., ¶
 6 (listing cases approving rates) and Wessler Decl., ¶ 3.

1 lodestar will be about 2.1, and that multiplier will continue to decrease as Class
2 Counsel spend more time on behalf of the class.¹³

3 In addition, Class Counsel have collectively incurred almost \$400,000 in
4 expenses, only \$118,610.80 of which will be reimbursed by Safeway as a taxable
5 expense,¹⁴ as reflected in the following chart:

Firm	Expenses
Chimicles & Tikellis LLP	305,158.09
Shepherd Finkelman Miller & Shah LLP	\$80,664.99
Total	\$385,823.08
Amount Reimbursed by Safeway	\$118,610.80
Unreimbursed Expenses	\$267,212.28

13 See Schwartz Decl., ¶ 21 & Exhibit 13; Shah Decl., ¶ 7 & Exhibit 2. Class Counsel
14 do not seek a separate award for unreimbursed expenses. Taking into consideration
15 these expenses and Class Counsel's future expenses and additional legal work
16 reduces the multiplier even more.¹⁵

17 As set forth in *In re CRT* (*id.* at 69-70) and discussed above, the Ninth Circuit
18 awarded a 3.63 multiplier in *Vizcaino* and noted that a survey of attorneys' fees
19 found that even in "megafund" cases 83 percent of such cases awarded a multiplier
20 from 1 - 4 and cited other cases awarding multipliers of between 2.5 - 3.5. Like this
21 Court in *Willner*, 2015 U.S. Dist. LEXIS 80697 at *22, Judge Alsup has recognized
22 that "Multipliers can range from 2 to 4 or even higher." *Gutierrez*, 2015 US Dist.

23
24 ¹³ Class Counsel take seriously their obligations to monitor, and prosecute as
25 necessary, notice and settlement/judgment distribution processes, and intend to do
so here. Schwartz Decl., ¶14.

26 ¹⁴ Consistent with the parties' Joint Report (ECF#473 at 8), Safeway will soon pay
Class Counsel \$118,610.80 in taxable costs.

27 ¹⁵ In contrast, all of the cases cited above awarded expenses separate from and in
28 addition to the percentage fee award.

1 LEXIS 67298 at *22, quoting *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
2 224, 255, 110 Cal. Rptr. 2d 145 (Cal. Ct. App. 2001).

3 In *Gutierrez*, Judge Alsup awarded a multiplier of 5 to Lead Class Counsel
4 Lieff Cabraser, and even awarded a multiple of 2 to a non-lead firm that was
5 replaced after “many blunders” that “nearly wrecked” the case, including performing
6 a “slapdash job on the original damages study” that resulted in their offering to settle
7 the case for \$20 million (less than 10% of the ultimate recovery). 2015 US Dist.
8 LEXIS 67298 at *23-24. Class Counsel’s efforts here are comparable to those of
9 Lieff Cabraser in *Gutierrez* and compare favorably to the other firm in that case
10 which still received a 2x multiplier.

11 In short, a lodestar cross check confirms that Class Counsel’s 35% request is
12 more than reasonable.¹⁶

13 7. Other Considerations

14 Most of the criticisms of class actions focus on whether class counsel
15 vigorously represent the interests of class members with undivided loyalty, or
16 whether in too many instances class counsel recover only illusory benefits for class
17 members that are disproportionate with requested fees. In recognition of those
18 concerns, the fee decisions of this Court’s and Ninth Circuit seek to properly align
19 the pecuniary incentives of class counsel with the interests of class members by
20

21 ¹⁶ Class Counsel do not believe that the amount Safeway previously paid Class
22 Counsel for discovery sanctions is relevant to the percentage or lodestar crosscheck
23 analysis. However, it has no material effect even if included. Reducing Class
24 Counsel’s lodestar by the sanctions payment for purposes of the lodestar cross check
25 would result in only a roughly 2.33 fee multiple net of expenses (*see* footnotes 3 and
26 15 above), which is still well-within the common range. Moreover, the total fees
27 (net of expenses) that would be paid to Class Counsel -- even including the
28 sanctions payment -- will be slightly less than 35% of the total benefits they
generated when the judgment amount, taxable costs, judgment administration costs,
and the sanctions award are factored in (see footnote 8 above).

1 awarding either higher *or lower* fees based on holdings that: “The most important
 2 factor is the results achieved for the class. Outstanding results merit a higher fee”
 3 but, in contrast, “where the plaintiff achieved only limited success, the district court
 4 should award only that amount of fees that is reasonable in relation to the results
 5 obtained.” *In re CRT*, 2016 U.S. Dist. Lexis 102408 at *62-63. Approving the 35%
 6 request here is consistent with the goal of establish proper incentives for class
 7 counsel to maximize recoveries for the classes thy represent.

8 **C. Service Award for Class Representative Michael Rodman**

9 Class Counsel also request that the Court approve a \$10,000 service award for
 10 Rodman. As class representative, Rodman’s efforts included producing hundreds of
 11 pages of his personal records (such as bank and credit card statements), responding
 12 to several sets of written questions by Safeway, traveling from Philadelphia to San
 13 Francisco to appear for a court-ordered Early Neutral Evaluation and then again for
 14 a full-day deposition, preparing to appear at trial and working with Class Counsel
 15 over the course of more than six years to obtain the Judgment and defend it against
 16 Safeway’s appeal. Rodman Decl., ¶¶ 2-10; Shah Decl., ¶ 11. Class Counsel submit
 17 that the proposed award is consistent with the standards set forth in *Radcliffe v.*
 18 *Experian Info. Solutions Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013) and *Willner v.*
 19 *Manpower, Inc.*, No. 11-cv-02946-JST, 2015 U.S. Dist. LEXIS 80697 at *25-30
 20 (N.D. Cal. June 22, 2015).

21 **D. The Plan of Distribution, Including the**
 22 **Cy Pres Residual, Should be Approved**

23 Since the Judgment was affirmed, the Parties, with the assistance of two
 24 experienced class action settlement administrators, have engaged in significant
 25 discussions and analyses to evaluate how to distribute the Judgment (net of any fees
 26 awarded to Class Counsel) to Class members. Schwartz Decl., ¶16. Based on their
 27 evaluation, the Parties reached the following agreement:

- 1 • Checks will be mailed via first-class US mail.
- 2 • The amount of each Class members' check will be each Class
- 3 members' *pro rata* share of the Judgment available for distribution (*i.e.*
- 4 the Judgment plus pre- and post-judgment interest minus any attorneys'
- 5 fees/expenses and service award approved by the Court). Each Class
- 6 members' *pro rata* share will be based on the amount of the markup
- 7 that Class member was charged by Safeway, with adjustments for
- 8 refunds/returns, plus the pre-judgment interest associated with the
- 9 specific dates of that Class member's grocery transactions;
- 10 • Checks will be issued after this Court's decision on Class Counsel's
- 11 Motion for attorneys' fees/expenses and the proposed service award for
- 12 Mr. Rodman becomes final. Before mailing out checks, the Judgment
- 13 Administrator will send an email to Class members with valid email
- 14 addresses to advise them that their checks will be mailed soon and
- 15 confirm their mailing address.¹⁷ After checks are mailed, the Judgment
- 16 Administrator will send at least three reminder emails to Class members
- 17 who have not cashed their checks. Class members will have 90 days to
- 18 cash the checks from the date of mailing. To the extent any of the
- 19 checks come back as undeliverable, the Judgment Administrator will
- 20 take reasonable steps to identify the correct mailing address for that
- 21 particular Class member.
- 22 • After reasonable efforts by the Parties and Judgment Administrator to
- 23 encourage Class members to cash checks are exhausted, it is likely that
- 24 there will be money remaining due to uncashed checks. Depending on
- 25

26 ¹⁷ The Parties have also instructed the Judgment Administrator to send an additional
27 mailing to Class members who paid more than \$1,000 in total markups reiterating
28 the request in the Notice to ensure that checks are written to the appropriate person
or entity.

that amount, Class Counsel anticipate that they will request that, if practicable, the Court approve sending a second check to those Class members *who cashed their first checks* in proportion to their share of the Judgment. *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (“Federal courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds.”); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 U.S. Dist. Lexis 102408 at *30-31 (N.D. Cal. Aug. 3, 2016). As noted above, Safeway reserves its position with respect to whether any distribution of checks after the first distribution is warranted and how the costs should be allocated for any further check distributions that Class Counsel may advocate.

- To the extent there is any money remaining (whether after a first distribution or a second distribution if one occurs), Class Counsel request, with Safeway’s consent, that such remaining money be distributed *cy pres*. Class Counsel propose, and Safeway has agreed, that such remaining money be distributed to Meals on Wheels, a national senior nutrition program, that, among other things, delivers nutritious meals to senior citizens. The *cy pres* of any residual funds to this organization meets the standards set forth in *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) and *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (requiring “a driving nexus between the plaintiff class and the *cy pres* beneficiaries.”).

The Court should approve this plan. Mailing checks will result in higher expected cashing rates compared to other methods to get money to class members. Schwartz Decl., ¶16. Calculating each class member’s *pro rata* share by taking account of each member’s markup and associated interest is the allocation most

1 consistent with the Judgment, which was an aggregation of the markup and interest
 2 for each individual transaction. The plan for multiple email check cashing reminders
 3 represents best practice and has been effective in maximizing cashing rates in other
 4 cases. *Id.* Redistributing funds from uncashed checks to class members who cashed
 5 their checks in the initial round of distribution makes sense. Finally, the proposed *cy*
 6 *pres* distribution to Meals on wheels of any residual after meets the standards set
 7 forth in *Nachshin* and *Dennis, supra*. Assuming there is a second distribution, such a
 8 residual will likely be small. Moreover, before making such a *cy pres* distribution,
 9 once the exact amount is known, Class Counsel will request Court approval.

10 IV. CONCLUSION

11 Representative Plaintiff Michael Rodman and Class Counsel respectfully
 12 request that the Court approve Class Counsel's request for attorneys' fees and
 13 expenses, approve the \$10,000 service award, and approve the proposed plan of
 14 judgment distribution. Plaintiff and Class Counsel will provide an update to the
 15 Court and address any objections or other comments by class members in their
 16 Reply currently due on March 15, 2018.

17
 18 Respectfully Submitted,

19 Date: January 4, 2018

20 CHIMICLES & TIKELLIS LLP

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MICHAEL RODMAN and the Class

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2018, I electronically filed the Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Attorneys' Fees and Expense Reimbursement, Service Award, and Approval of Judgment Distribution Plan using this Court's CM/ECF system. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

Dated: January 4, 2018

/s/ Steven A. Schwartz

Steven A. Schwartz